2006

A-1 Disposal v. Mel Ingersoll : Brief of Appellee

Utah Court of Appeals

Carl E. Kingston; Attorney for Appellee.
Blake S. Atkin; William O. Kimball; Brennan H. Moss; Attorneys for Appellant.

ORIGINAL

IN THE UTAH COURT OF APPEALS

A-1 DISPOSAL, Appellee/Plaintiff, v. MEL INGERSOLL, Appellant/Defendant.	Case No. 20060261

BRIEF OF APPELLEE A-1 DISPOSAL

Appeal from the Third Judicial District Court
Salt Lake County, Salt Lake Department, State of Utah
Honorable Bruce C. Lubeck

Blake S. Atkin
William O. Kimball
Brennan H. Moss
ATKIN LAW OFFICES
136 South Main Street, Suite A401
Salt Lake City, Utah 84109
Attorneys for Appellant Mel Ingersoll

Carl E. Kingston
3212 South State Street
Salt Lake City, Utah 84115
Attorney for Appellee A-1 Disposal

Date 8/24/06 UTAH SUPREME COURT/UTAH COURT OF APPEALS Case No. [redacted]

CHECKLIST FOR BRIEFS

✓ **RECORD HAS BEEN RETURNED.**

✓ **TIMELY FILING OF BRIEF**

An untimely brief may be rejected under **Rule 27(e).** If a brief is untimely, a motion under **Rule 26** will be mandatory for permission to file a late brief.

✓ **CORRECT NUMBER OF COPIES**

1. Supreme Court: **10** copies, one containing original signature
2. Court of Appeals: **8** copies, one containing original signature

✓ **LENGTH** (Excluding Addendum)

1. Appellant, Appellee/Cross-appellant: **50** pages
2. Appellant/Cross-appellee Reply: **25** pages
3. Appellee/Cross-appellant Reply: **25** pages
4. Guardian ad Litem or Intervenor: **50** pages
5. Amicus Curiae **No Limit**

✓ **SIZE AND BINDING**

✓ **PRINTING REQUIREMENTS**

1. Proportionally spaced typeface must be **13-point** or larger for both text and Footnotes; mono-spaced typeface may not contain more than 10 characters per inch.
2. Print on both sides of the page.
3. Double-spaced; 1 ½ spacing is unacceptable.
4. 1" margin on all sides

✓ **COVER REQUIREMENTS**

✓ 1. Color: Appellant: **Blue** Appellant/Cross-appellee Reply: **Gray**
Appellee/Cross-appellant: **Red** Appellee/Cross-appellant Reply: **Gray**
Amicus, Intervenor, Guardian: **Green**

✓ 2. Name of counsel and parties represented

a. Counsel filing brief on **lower right**

b. Opposing counsel on lower left

✓ **CONTENT REQUIREMENTS - IN ORDER STATED**

✓ List of all parties

✓ Table of Contents with page references

✓ Table of Authorities

✓ Jurisdictional Statement (**Mandatory for Appellant**)

✓ Statement of Issues & Standard of Review (**Mandatory for Appellant**)

1. Citation to record showing issue preserved in Trial court; **or**
2. Statement of grounds for seeking review of issue not preserved in Trial Court

✓ Constitutional or Statutory Provisions

✓ Statement of Case (**Mandatory for Appellant**)

✓ Statement of Facts

✓ Summary of Argument

Argument

✓ Conclusion

✓ Signature of counsel of record OR party if Pro Se

✓ Proof of Service

Addendum: Findings of fact; memorandum decision; final order; Court of Appeals opinion when Petition for Certiorari is granted (**Mandatory for Appellant**)

IN THE UTAH COURT OF APPEALS

A-1 DISPOSAL, Appellee/Plaintiff, v. MEL INGERSOLL, Appellant/Defendant.	Case No. 20060261

BRIEF OF APPELLEE A-1 DISPOSAL

Appeal from the Third Judicial District Court
Salt Lake County, Salt Lake Department, State of Utah
Honorable Bruce C. Lubeck

Blake S. Atkin
William O. Kimball
Brennan H. Moss
ATKIN LAW OFFICES
136 South Main Street, Suite A401
Salt Lake City, Utah 84109
Attorneys for Appellant Mel Ingersoll

Carl E. Kingston
3212 South State Street
Salt Lake City, Utah 84115
Attorney for Appellee A-1 Disposal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

JURISDICTION

The Court has jurisdiction over this matter pursuant to Utah Code Ann. 78-2a-3(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

A-1Disposal agrees that the issue is whether or not the Court erred when it ruled that there was no valid contract between the parties and agrees that the standard of review for findings of fact is the clearly erroneous standard. However, A-1 Disposal does not agree that both parties testified that there was a contract and does not agree that that issue was not in contention and was not disputed by the parties.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Rules of Appellate Procedure, Rule 24(a)(9):

Rule 24. Briefs.

> (a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

Utah Rules of Civil Procedure, Rule 54(c)(1):

Rule 54. Judgments; costs;

(c)(1) *Generally.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not

demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

STATEMENT OF THE CASE

A. Nature of the Case.

The case involves a claim by A-1 Disposal for money due for waste disposal services provided to Mel Ingersoll. Mr. Ingersoll counterclaimed, alleging that A-1 owed him money for a credit allegedly due him, pursuant to a hand written agreement.

A-1 claimed that any agreement that Mr. Ingersoll was due a credit was void because Mr. Ingersoll and Mark Powell, who was not named and who was to perform certain obligations not identified in the written document, had failed to perform the obligations that would have resulted in the credit being due. Mr. Ingersoll claimed that despite the fact that Mr. Powell was not made a party to the written document and the obligations to be performed by Powell were not identified, Mr. Ingersoll was still entitled to the credit.

B. Course of Proceedings and Disposition in the Court Below.

A-1 filed suit against Mr. Ingersoll, claiming money due for the services rendered. Mr. Ingersoll filed a counterclaim, claiming that there was a balance due to him because of the credit he claimed under a hand written document signed by Mr. Anderson in May 2002. The case was tried before the Honorable Bruce C. Lubeck on April 27, 2005 without a jury and A-1

was awarded judgment in the amount of $8,307.00, plus interest on that amount from September 10, 2002. Recovery on Mr. Ingersoll's counterclaim was denied.

Mr. Ingersoll filed a Motion for New Trial or to Alter or Amend Judgment on May 14, 2005. That Motion was denied by Minute Entry dated February 8, 2006. Mr. Ingersoll now appeals from the denial of that Motion and the judgment of the Court.

C. Statement of Facts.

On May 15, 2002, Ralph Anderson, manager of Appellee A-1 Disposal, met Appellant Mel Ingersoll and a third party, Mark Powell, at a fast food restaurant in Salt Lake City, to discuss a business proposition that would involve A-1 Disposal, Mr. Ingersoll and Mr. Powell. A-1 had previously provided trash disposal services to Mr. Powell and there was an outstanding debt due to A-1 from Mr. Powell. Mr. Anderson had never met Mr. Ingersoll and A-1 Disposal had never done business with Mr. Ingersoll before the meeting. R. at 88, pp. 17-19. After some discussion, Mr. Ingersoll wrote out a document on scratch paper that was signed by Mr. Anderson and Mr. Ingersoll, but not by Mr. Powell. The document provided,

> Wherein A-1 acknowledges a credit owing Mel Ingersoll in the amount of $14,500, to be paid in the following manner: A-1 will furnish 30 yard (drop off) containers for Ingersoll for a cost of $75.00 each with A-1 paying landfill cost over that. Thereby if trucking & landfill total $10,000 for a month, Ingersoll will pay $2500 and use the $7500 credit on the amount due. Billing will be at month end, with the payment 25% of total bill to be paid by 10th of month following. Service can continue after credit is used up if its agreeable with both parties. R. at 88, p.20; R. at 44.

There were also oral discussions between the parties at this meeting regarding the proposed transaction, as Mr. Powell was to deliver a truck and three containers to A-1 and Mr. Ingersoll was to deliver a truck to Mr. Powell, but there were apparently no terms agreed to as to when, where and how the performances of each party was to be completed. R. at 88, pp. 19-20. A-1 immediately began providing service to Mr. Ingersoll, and continued the service through August 2002. R. at 88, pp. 21-22. Invoices for the services were sent by A-1 to Mr. Ingersoll weekly, but Mr. Ingersoll failed to pay for the services provided. R. at 88, p. 21. A-1 did receive a truck and two containers from Mr. Powell, but the truck was not in working condition and repair parts were not available, so the truck was never operable. The third container was never delivered to A-1 by Mr. Powell. R. at 88, pp. 53-54. Mr. Powell advised A-1 that he had not received the truck or the title to the truck from Mr. Ingersoll. R. at 88, pp. 23, 46. Although there was evidence that Mr. Ingersoll did deliver a truck to Mr. Powell, the title to the truck showed that Mr. Ingersoll retained a lien on the truck, and accordingly, the title was returned by the Department of Motor Vehicles to Mr. Ingersoll. R. at 88, p. 96. Prior to trial, Mr. Ingersoll took possession of the truck, ostensibly, because Mr. Powell owed Mr. Ingersoll on a debt. R. at 88, p. 124.

A-1 and Mr. Ingersoll talked in July and August about the bill owing from Mr. Ingersoll and Mr. Ingersoll acknowledged that he owed some money, but he claimed that he could not understand A-1's statements and

billing procedures and said he needed to reconcile the invoices. R. at 99, pp. 22-24. In October 2002, Mr. Anderson and Mr. Ingersoll met to resolve the accounting and to discuss payment for the waste disposal services. R. at 88, p.24. At this meeting, they reached an agreement that the amount owed for the services was $8,307.00 and according to Mr. Anderson, Mr. Ingersoll agreed to pay that amount. R. at 88, p. 25. At trial, Mr. Ingersoll disputed that he made any such agreement and contended that A-1 still owed him the credit due for the truck he was to deliver to Mr. Powell. R. at 88, p. 99.

In November 2002, Anderson, Ingersoll, Mark Powell and Daniel Kingston, an officer of A-1 Disposal, met at Kingston's office to discuss payment of both Mr. Ingersoll's and Mr. Powell's past due accounts. At this meeting, Mr. Ingersoll said that he was dealing for both himself and Mr. Powell and that he wanted to resolve both accounts. R. at 88, pp. 27-28, 68-71. Mr. Ingersoll acknowledged that he owed $8,307.00 for the services and that the credit of $6,193.00 could be credited to what Mr. Powell owed A-1. In December 2002, A-1 applied the credit towards Mr. Powell's account, leaving a balance due from Mr. Ingersoll of $8,307.00. R. at 88, p. 28.

SUMMARY OF THE ARGUMENT

A-1 contends that the judgment of the trial Court should be affirmed, because Mr. Ingersoll has failed to marshal the evidence in support of the Court's Findings of Fact. In addition, A-1 contends that the court properly ruled that any agreement that Mr. Ingersoll was entitled to credit was not a valid contract and was unenforceable, for the reasons that it was ambiguous,

did not contain the essential terms of any agreement between the parties and there was no meeting of the minds of the parties. A-1 further contends that the trial Court correctly ruled that A-1 was entitled to recover the value of the services rendered, which the parties agreed was $8,307.00, under a theory of unjust enrichment.

ARGUMENT

1. THE TRIAL COURT'S JUDGMENT IN FAVOR OF A-1 SHOULD BE AFFIRMED.

A-1 contends that the trial Court properly ruled in favor of A-1 on its Complaint and against Mr. Ingersoll on his Counterclaim and that the judgment should be affirmed.

A. Mr. Ingersoll Has Failed To Marshal the Evidence Supporting the Court's Findings of Fact.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires "[a] party challenging a fact finding [to] first marshal all record evidence that supports the challenged finding." See also, State v. Clark, 2005 UT 75, 124 P.3d 235; Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, 54 P.3d 1177. To pass this threshold, the party protesting findings of fact must "marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Clark, 2005 UT 75. Where an appellant fails to so marshal the evidence, the appellate court will assume that all findings of fact are adequately supported by the record. Chen v. Stewart, 2004 UT 82, 100 P. 3d 1177; 438 Main St. v. Easy Heat, Inc., 2004

UT 72, 99 P. 3d 801. The appellate court then need not consider the challenge to the sufficiency of the evidence. Tanner v. Carter, 2001 UT 18, 20 P. 3d 332. Mr. Ingersoll has totally failed to marshal any of the evidence supporting the trial court's findings, but simply cites the evidence he contends supports his theory.

There was ample evidence introduced at trial to support the court's findings of fact that there was no valid contract. For example, Mr. Anderson testified when asked whether or not he agreed that Mr. Ingersoll was entitled to the $14,500.00 credit, that "the original agreement was over." R. at 88, p. 26. He also testified that "there wouldn't be any further services to use up the credit." R. at 88, p. 38. He testified that Mr. Ingersoll never claimed to be owed anything on the alleged credit. R. at 88, pp. 28, 49 and 132. Daniel Kingston also testified that Mr. Ingersoll never claimed to be entitled to any credit, R. at 88, p. 70.

Further, it is clear from the written document itself, that essential terms for enforcement were missing. As the court found,

> The May 15, 2002, written document is not an integrated contract and indeed was not even a valid contract as it did not fully state several essential terms to form a valid agreement." R. at 47.

The document did not mention Mr. Powell or what he was supposed to do, did not describe the consideration that was to be given, did not state when or where any performance was to be completed, or provide any remedies for non-performance. It was also clear from the evidence presented at trial, based upon the actions of the parties, that very shortly after the

document was executed, none of the parties considered the document to have any validity.

B. A-1 Did Not Make Judicial Admissions of the Existence of a Contract That Entitled Mr. Ingersoll to $14,500.00 credit

It is true that A-1 sued Mr. Ingersoll and that the Complaint alleged that Mr. Ingersoll owed A-1 $9,006.25 for goods and services rendered. R. at 1. That was the value of the services A-1 contended was owed for the services provided, pursuant to the agreement of the parties. It is clear from the Complaint, that A-1 did not agree that Mr. Ingersoll was due any credit under the May 15, 2002 document. In A-1's reply to Mr. Ingersoll's Counterclaim, R. at 8-9, A-1 specifically denied paragraph 3 of Mr. Ingersoll's Counterclaim that alleged,

> On or about May 15, 2002, counterclaim defendant Ralph Anderson (Anderson) entered into a contract with counterclaim plaintiff Mel Ingersoll (Ingersoll). R. at 6.

A-1 also asserted the affirmative defenses to Mr. Ingersoll's counterclaim based upon the alleged contract, of failure or lack of consideration, prior breach by Mr. Ingersoll and the statute of frauds. These judicial pleadings, along with the testimony of A-1's witnesses cited above, certainly put Mr. Ingersoll and his counsel on notice that A-1 disputed the validity of any agreement to credit Mr. Ingersoll $14,500.00. Mr. Ingersoll argues that the proposed Findings of Fact filed by A-1 was a judicial admission, binding upon A-1. Mr. Ingersoll neglects to identify these Findings of Fact as "proposed", submitted to the court prior to trial, before any evidence was

offered and not accepted or adopted by the trial court. The proposed findings also stated in paragraph 8 "That the May 15, 2002 agreement became void" for non-performance. R. at 37. The evidence presented fully supported the trial court's findings that there was no enforceable contract. As Mr. Ingersoll failed to marshal the evidence supporting the trial court's findings, it should be assumed that the findings are supported by the evidence.

C. The Testimony and Conduct of A-1 Do Not Show the Existence of a Contract

Contrary to what Mr. Ingersoll claims the evidence showed, (without marshaling the evidence supporting the findings as required) the evidence was clear that the parties, subsequent to May 15, 2002, did not rely upon or consider the May 15, 2002 document to be binding. Mr. Powell delivered an inoperable truck and two, rather than three, containers to Plaintiff. Mr. Ingersoll delivered a truck to Mr. Powell, however, he did not deliver the truck free and clear of liens. The title to the truck, listing Mr. Powell as owner, listed Mr. Ingersoll as a lien holder, showing that Mr. Ingersoll retained a security interest in the truck. Being listed as lien holder, when the transfer of title to Mr. Powell did take place, the new title would have been returned to Mr., Ingersoll, not Mr. Powell. That explains why Mr. Ingersoll, not Mr. Powell, had the title at trial and why Mr. Powell was apparently confused about when if ever, he received the title. R. at 88, p. 122. Clearly, no party followed through on any part of the May 15, 2002 document. The actions of the parties

demonstrated that no party considered the written document to be binding on any of them. Mr. Ingersoll did not pay what and when the May 15, 2002 document said he would pay. Mr. Ingersoll acknowledged that he owed Plaintiff for service and never asked for the claimed credit until after this lawsuit was filed. The service of Plaintiff to Defendant was terminated after three or four months. Clearly, the evidence of an enforceable contract was not "undisputed" as Defendant claims, but instead, preponderated in favor of the Court's ruling.

Mr. Ingersoll's reliance on the case of Osguthorpe v. Anschutz Land & Livestock Co., 456 F2d 996 (10th Cir. 1972) is misplaced. That case was not a bench trial as ours was, but was tried to a jury. The issue on appeal concerned the instructions that were given to the jury and the failure of the judge to give certain other instructions requested by the appellant. The Tenth Circuit Court of Appeals ruled in this case that the instructions given "precluded the defendant from advancing any tenable defense" and "the defendant was blocked out and frustrated in advancing a defense". In our case, there was no jury, no instructions and the judge carefully considered all of the offered evidence.

D. The Trial Court's Finding Did Not Violate Mr. Ingersoll's Due Process of Law

Mr. Ingersoll alleges that the trial court's finding that there was no contract between the parties deprived him of due process, because he did not have adequate notice that the existence of a contract was at issue and he was therefore deprived of the opportunity to be heard in a meaningful way. This

argument is not supported by the record. Mr. Ingersoll's whole case was centered on proving the existence of a contract. His counterclaim pled for relief based upon the supposed contract. A-1's Complaint and Reply to Counterclaim disputed the validity of any such contract. The document Mr. Ingersoll claimed to be a binding contract was received as evidence in the case, and Mr. Ingersoll called witnesses to support his theory that the document constituted a binding contract between the parties. In closing argument, he asked the trial court to award him judgment based upon the written document.

Mr. Ingersoll cites the case of Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), as support for his due process argument. That case is readily distinguishable from our case. In Nelson, the defendant was *pro se.* He had discharged his attorney and apparently had not received from his attorney the file that contained the pleadings in the case. He appeared in court pursuant to the plaintiff's motion to set aside a stipulated dismissal of the case and to set the matter for trial. The defendant appeared at the hearing on the motion, without counsel and the motion was granted. The court informed the defendant that the matter would be set for a hearing (not a trial) two weeks later. Two days before the case was scheduled for trial, the defendant received the notice of trial from the court. Defendant appeared for trial without counsel and judgment was awarded to plaintiff on a cause of action for alienation of affections, in the total sum of $84,600.00, which included $25,000.00 punitive damages. The Utah Supreme Court reversed, holding that giving the

defendant two days notice of the trial and not informing him of his rights as a *pro se* litigant, deprived him of due process. The court said at page 1214,

> The deficiency in this case concerns what happened before the trial. The vulnerability of a layman who is unrepresented as he approaches a trial of the legal and factual complexity of this case requires more judicial consideration than was extended here. Most importantly, defendant was not clearly informed of the date of trial until two days before it was to begin. That deficiency jeopardized one of the most important ingredients of due process: time to prepare a defense.

In our case, the Complaint, Counterclaim, and the Reply to Counterclaim clearly presented the issues of whether or not there was a contract that entitled Mr. Ingersoll to any credit, whether that contract was void, and whether or not, if there were a contract, it was breached. A-1's Reply to Mr. Ingersoll's Counterclaim denied the existence of the contract. A-1's counsel, in his opening statement, speaking of the May 15, 2002 agreement, said, "So that agreement, at least in the eyes of the plaintiff, was void. It wasn't followed through; it was breached". R. at 88, p. The evidence and the testimony of the witnesses called by both parties, all spoke to those issues. Mr. Ingersoll was represented throughout the proceedings by competent counsel, who had conducted discovery, including deposing Mr. Anderson. There were no surprises and Mr. Ingersoll's due process rights were fully protected.

E. Rule 54, U.R.C.P. Provides That a Judgment Shall Grant the Relief to Which the Party In Whose Favor It Is Rendered Is Entitled.

Even if Mr. Ingersoll were correct, that the judgment of the trial court does not conform to the pleadings or to the relief requested by A-1, which clearly is not the case, Rule 54, U.R.C.P. provides,

(c)1) *Generally.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Based upon all of the evidence presented at trial, the trial court properly concluded that Plaintiff was entitled to judgment in its favor, for the amount awarded and so ruled.

CONCLUSION

The trial court heard the testimony of the witnesses, assessed their credibility, viewed the documentary evidence, and after taking the matter under advisement and weighing all of the evidence presented, found in favor of the plaintiff. For the foregoing reasons, A-1 respectfully asks this court to affirm the judgment of the trial court.

Dated this 28 day of August, 2006.

Carl E. Kingston
Attorney for A-1 Disposal

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of August, 2006, two true and correct copies of the foregoing **BRIEF OF APPELLEE** were sent via U. S. mail, postage prepaid, to the following:

Blake S. Atkin
William O Kimball
Brennan H. Moss
Atkin Law Offices
136 South Main Street, Suite A401
Salt Lake City, Utah 84109

Carl E. Kingston